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Air Quality Management District
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December 6, 2005

Barbara Riordan, Chairman
California Air Resources Board
1001 I Street
P.O. Box 2815
Sacramento, CA 95812

Dear Chairman Riordan:

On behalf of the South Coast Air Quality Management District ("South Coast District"), I would like to thank you and the CARB Board for providing the public the opportunity at the October 2005 meeting in El Monte, California to voice concerns over the CARB/railroad Memorandum of Understanding (MOU). The South Coast District truly appreciates your decision to open up this and future MOUs to a more transparent, public process.

In this regard, the public meeting in October shed light on some of the many ambiguities contained in the MOU. Accordingly, at the conclusion of that meeting the CARB Board directed staff to provide by January 2006 some clarification to the more problematic provisions in the MOU. The South Coast District believes that your Board's decision to send the MOU back for further clarification makes very good sense, and is a good step toward resolving the controversy surrounding the MOU.

To assist CARB staff in complying with your Board's request, the South Coast District has reviewed the text of the agreement specifically to identify those provisions that, from a legal or technical standpoint, must be clarified if the MOU is ever to be meaningfully implemented. Through this process, we have developed the attached list of provisions in the MOU that, as currently drafted, are ill-defined and/or ambiguous. We believe that CARB staff must renegotiate these provisions to provide better clarity and understanding, and to ensure that the substantive requirements of the MOU are enforceable. I ask that you provide this list to CARB staff and ask them to address these concerns before the January 2006 CARB Board meeting.

In reviewing the attachment, understand that our intent is not to describe the shortcomings of the MOU. The South Coast District has previously provided detailed comments to CARB on our concerns that the MOU does not go far enough to achieve emission reductions from locomotives operated in the South Coast Basin. The purpose of this letter, and the attachment, is to take an assessment of the MOU to determine which provisions must be clarified if the MOU is to effectively address known public health risks associated with locomotive and rail yard emissions within California.

With this in mind, we have identified some fundamental questions regarding the scope and enforceability of the MOU. Indeed, it is our view that most of the substantive provisions of the MOU – including the restrictions on idling – are not legally enforceable against the railroads, and, therefore, the MOU falls far short of ensuring that the railroads will make reductions in air pollution that are critically needed in the South Coast and throughout California to protect public health.

For example, the MOU uses vague language to address reduction in emissions associated with locomotive idling. Under Program Element 1, the railroads merely promise to reduce idling when it is "feasible" to do so or when idling is "unnecessary" for rail operations. This language, however, is so broad and ill-defined that the MOU essentially provides the railroads unfettered discretion to determine on a case-by-case basis whether or not to reduce idling from a locomotive. Unless the MOU is revised to identify the exact legal obligations of the railroads to reduce idling, this Program Element is unenforceable and cannot be claimed by CARB as an environmental benefit.

Similarly, the MOU is vague on reduction of toxic air pollution associated with rail yards. The language in Program Elements 4 and 5 does not provide any assurance that reduction in toxic emissions will ever occur under the MOU. The South Coast does not believe it is the intent of this Board to give approval to an MOU that requires CARB to expend millions of dollars on health risk assessments for rail yards, but then does not require any actual risk reduction at all from the railroads. Unfortunately, as currently written this is exactly what the MOU would do.

Finally, the language of the termination clause in the MOU continues to be a source of confusion. Indeed, as made clear by statements from both CARB staff and railroad representatives at the October meeting, it appears that even those involved in the drafting of the MOU are now uncertain just exactly how broad the scope of the termination clause may be and/or whether it would preclude legitimate uses of local police power to reduce public health risks associated with local rail operations.

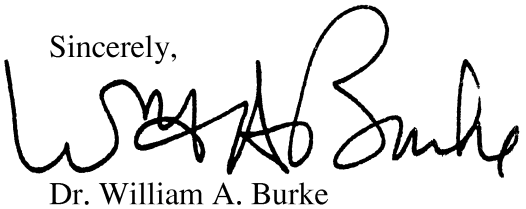
Thus, at the October meeting, CARB staff and the railroads asserted that they now believe the scope of the release in the MOU is intended to be no broader than the release in the 1998 MOU. The 1998 clause, however, was limited to instances in which other

jurisdictions imposed restrictions that were "preempted" by federal law. On its face, the language of the release clause in the current MOU is obviously much broader. The language in the MOU might cover not only the enforcement of newly adopted regulations that may be preempted, but virtually any attempt by a local agency to address emissions from locomotives or rail yards.

Along these same lines, CARB staff and railroad representatives also stated that the termination clause would not affect attempts by local jurisdictions to impose measures to limit health risks during a new rail yard siting process. Again, however, nothing in the release clause reflects this position. Moreover, CARB and the railroads have not explained whether the release clause would also allow local agencies, such as the ports or cities, to impose measures where the physical boundaries or the capacity of existing rail facilities are expanded, an activity very much akin to construction of a new facility. Absent the MOU, imposition of risk reducing measures at new and expanded facilities is a legitimate use of local authority and, therefore, should be excluded from the scope of the release clause.

In short, the ambiguities we have identified go to the very heart of the purported purpose behind the MOU – to ensure effective reductions in public health risks associated with locomotive and rail yard air emissions. While we cannot be certain why these ambiguities exist in the MOU, we do believe that with earlier public participation many of them would have been caught and, hopefully, corrected. To ensure then that these fundamental issues will not again be addressed behind closed doors, I am also asking you to extend a seat at the table during the clarification of this MOU to air agencies and representatives of the public. It is only by taking this step that CARB can adopt an MOU that accounts for the interests of the public, and that, consequently, the public can support.

Sincerely,



Dr. William A. Burke
Chairman, Governing Board

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Encl.

cc: CARB Board Members

Attachment

A. General.

Issue: The MOU does not establish specific criteria to define the terms "feasible" and "feasibly." These terms, used throughout the MOU to establish the obligations of the railroads, lack an objective, enforceable definition. The current language in the MOU provides the railroads unfettered discretion to determine what they consider to be "feasible" based upon cost.

Discussion:

These terms are used throughout the MOU to establish the obligations of the railroads. For example, under the MOU the railroads are called upon to:

- reduce idling "by the maximum amount feasible" where an anti-idling device is installed (Program Element 1, Paragraph (b));
- report to CARB regarding anti-idling devices on interstate and intrastate locomotives and the idling reduction limits these devices can "feasibly" achieve (Program Element 1, Paragraph (c));
- determine if "feasible" changes to rail yard operation and/or "feasible" mitigation measures can lessen the impact of emissions on adjacent neighborhoods ("early review") (Program Element 3, Paragraphs (a) – (d)); and,
- determine "feasibility" of alternative technologies, such as "diesel particulate filters, oxidation catalysts, as well as possible future mitigation measures at rail yards" (Program Element 8, Paragraphs (a) and (c)).

The MOU currently defines that the terms "feasible" and "feasibly" as referring to "measures and devices that can be implemented by the Participating Railroads, giving appropriate consideration to costs and to impacts on rail yard operations." MOU, para. C (emphasis added). This definition lacks any objective standard to determine what is feasible. Indeed, the MOU appears to have given the railroads unfettered discretion to determine what is "appropriate" consideration of costs and impacts. Without clarification, therefore, it is likely that a substantial portion of the MOU, including idling limitations for certain locomotives with anti-idling devices, is rendered unenforceable.

In short, clarification is needed regarding the railroads' obligations to implement "feasible" measures. One suggestion is to establish within the MOU specific cost-effectiveness criteria to guide "feasibility" determinations. Another approach would be to delete altogether the "feasibility" requirements and instead set forth minimum (but mandatory) requirements in the MOU.

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B. Program Element 1 – Anti-Idling Devices.

Issue: The idling performance standards are vague and/or contain substantial loopholes in favor of the railroads. Because the railroads have ample room under the existing language to argue on a case-by-case basis that the standard does not apply, it is unlikely that CARB could enforce the idling restrictions in the MOU as currently drafted.

Discussion:

The MOU purports to contain two performance standards to ensure that "non-essential" idling of locomotives is reduced – one for locomotives with anti-idling devices and one for locomotives without such devices. However, the terms used in these standards are vague and undefined, and taken as a whole these standards also appear to be unenforceable. The potential problems in enforcing the standards are discussed separately below.

(a) Standard for locomotives with anti-idling devices.

The performance standard for locomotives with anti-idling devices limits idling to 15-minutes, unless a 15-minute shutdown cycle would "risk[] excessive component failures." In such a case, the railroads must merely reduce idling to the maximum amount "feasible." There is no indication in the MOU as to what constitutes a "risk," what is considered "excessive," or for that matter what is a "component failure." As drafted, the MOU leaves the determination of whether idling in excess of 15 minutes is necessary to avoid the risk of excessive component failure solely in the hands of the railroads. Coupled with the lack of clarity with regards to the term "feasible" (as discussed above), it appears that for all practical purposes this standard is unenforceable unless the railroads admit that they exceeded the limit and there was no risk of component failure.

(b) Standard for locomotives without anti-idling devices.

The performance standard for locomotives without anti-idling devices states that the railroads shall "exert their best efforts" to limit non-essential idling and in no event shall be longer than 60 consecutive minutes. Distilled to its essence, this is a 60-minute standard because it is likely impossible to enforce the requirement that the railroads "exert their best effort" to further limit idling.

On its face this 60-minute standard does appear absolute and enforceable. However, when this standard is read in conjunction with the "Exceptions to Idling Limits" provision of the MOU it becomes apparent that the 60-minute standard is discretionary; in fact, the railroads have substantial room to argue a case by case basis that a locomotive was not bound to comply with the standard.

The exceptions to Program Element 1 in the MOU provide that "[i]t shall be considered essential for an unoccupied locomotive not equipped with an anti-idling reduction device to idle when the anticipated idling period will be less than 60 minutes." (Emphasis added). In other

words, if the railroad does not anticipate the need for a locomotive to idle in excess of 60 minutes, it need not shut down the engine. As drafted, this provision can be read even broader, providing the railroad an excuse for all excessive idling regardless of length so long as the railroad initially believed that the idling event would be less than 60 minutes. Given this plausible reading of the MOU, the exception swallows the rule in that the railroad can always claim that the excessive idling was not initially "anticipated."

On this point, it is interesting that at the September 22, 2005 Working Group meeting for PR3502, railroad representatives essentially acknowledged that excessive idling is routinely not "anticipated" when it occurs. Examples were given of when a crew stops the train to go to lunch, which could unexpectedly take longer than anticipated, or where there is a crew change and the departing crew did not anticipate the arriving crew being stuck in traffic. In both cases, and likely many more, it is arguable that the railroads would not be in violation of the idling standard in the MOU if these locomotives were not equipped with an anti-idling device. In short, the exception for "unanticipated" idling is so vague and broad that it virtually prevents effective enforcement unless the railroads admit that the idling beyond 60 minutes was intentional.

Unless clarified, the "performance standards" do not bind the railroads to meet any specific idling requirements. Also, because the terms of the standards are so vague there is likely to be inconsistent interpretation not only between the two participating railroads, but between individual rail yard employees and locomotive operators. For these reasons, the AQMD suggests that the MOU should make the idling standards absolute – 15 minutes for locomotives with anti-idling devices and 60 minutes for non-equipped locomotives – and then place the burden on the railroad to demonstrate that a violation should be excused due to safety reasons or because compliance would have interfered with railroad operations.

Issue: The MOU does not contain language to safeguard against railroad employees momentarily turning off locomotive engines, or briefly moving locomotive, solely to avoid excess idling in violation of a performance standard.

Discussion:

The MOU broadly states that, for locomotives without anti-idling devices, "in no event shall a locomotive be engaged in non-essential idling for more that 60 consecutive minutes." (Emphasis added). Thus, a locomotive operator can easily avoid the standard by turning off the engine or moving the locomotive momentarily. As such, the performance standard for locomotives without idling devices needs to be clarified to ensure that railroads do not turn off the engine or move the locomotive momentarily to avoid idling for longer than 60 "consecutive" minutes. One suggestion is to specifically define idling to include "shutting down of engine(s) or use of engines in a locomotive or a consist of locomotives solely for the purpose of preventing continuous idling." This is how the South Coast District proposes to define idling in PR3501 and PR3502.

Issue: The exceptions to the idling performance standards contain vague and undefined language.

Discussion:

The MOU exempts from the idling standards, not only idling necessary for safety and comfort of the crew, but all "necessary maintenance activities." The scope of this exemption is vague at best. It is unclear from the MOU whether this means the idling standards do not apply to all "necessary" locomotive maintenance; or whether the exemption is limited to maintenance for which idling is necessary to complete.

AQMD staff is also unsure why the term "unoccupied locomotive" is defined in the MOU to include all of the trailing locomotives when the lead locomotive is occupied. An entire consist should not be exempt where all locomotives are idling and only the lead locomotive is occupied.

Further, the terms "essential" and "non-essential" have no legal meaning and should be expressly defined. Although the staff report to the MOU now states that the term "essential idling" is defined to include only a limited set of events related to safety and locomotive maintenance, the language of the MOU (which is controlling) suggests that the terms are subject to a much broader interpretation by the railroads.

In short, the MOU should contain a specific list of "exempt" maintenance activities that idling is necessary to complete. In this regard, AQMD does not understand why routine fueling should be exempt from idling standards. The railroads should be asked to provide specific information on why refueling locomotives cannot comply with the standard. AQMD also recommends clarification of the term "unoccupied locomotive" to eliminate the broad inclusion of unoccupied trailing locomotives. Lastly, in lieu of reference to "essential" v. "non-essential" idling, the MOU – as already noted above – should make the idling standard mandatory unless the railroad shows that the violations should be excused under the specific terms of the MOU.

Issue: The idling training program requirement is vague and needs clarification. The MOU appears to require only training of limited numbers of employees, specifically rail yard management and dispatchers. Further, the MOU suggests that these employees be trained merely to shut down locomotives "if they become" aware of excessive idling.

Discussion:

The only express training requirement in Program Element 1 is for railroads to train "appropriate" rail yard employees to shut down locomotives not equipped with anti-idling devices "if they become aware" that non-essential idling will exceed 60 minutes. The scope of training for other employees, including locomotive operators and others who can help identify excess locomotive idling in the field, while required, is left for determination by the railroads. Simply put, the overall training program is too vague to ensure compliance with the idling standards.

AQMD suggests that specific training requirements should be identified for a broader range of railroad employees to ensure that the idling standards are complied with in both rail yards and in the field. Moreover, the MOU should not simply train employees to shut down locomotives if they "become aware" of idling in violation of the MOU. All relevant employees should be trained to be proactive, and to "become aware" of the length of all idling events.

Issue: There are several general problems with Program Element 1 that require clarification to ensure enforceability of the MOU.

Discussion:

The following general items in Program Element 1 need clarification:

(a) The MOU makes it unclear whether reductions from anti-idling devices can be credited towards compliance with the 1998 MOU. This could eliminate NOx reduction benefits in SCAQMD.

(b) If all "covered yards" includes "designated yards" per Attachment B to the MOU, why the different language in paragraphs (g) and (h)? Clarify that both the program coordinator requirement and community reporting requirement apply to all yards listed in Attachments A and B.

(c) The inventory and annual reporting requirements need clarification. If the purpose is to ensure an accurate accounting of the number of locomotives being operated in California with or without anti-idling devices, the requirements in the MOU only paint half the picture. The railroads are required to report annually on the number for locomotives that were equipped the previous year with these devices – allowing them to claim credit for progress – but are not required to report whether additional locomotives have entered the state during the year that are not so equipped. Thus, the MOU should clarify that the railroads are also required to annually: (1) report on the total number of interstate locomotives not equipped with anti-idling devices operating in California each year, and; (2) update the information on their entire intrastate fleets so it can also be determined if locomotives without anti-idling devices were added to the fleet during the previous year.

(d) Enforcement protocol should be incorporated into the MOU before the January 2006 CARB Board meeting to allow public comment on this aspect of Program Element 1. This protocol should clarify why the CARB has "sole authority" to assess penalties. This is inconsistent with California's general air quality enforcement process, which gives more authority to local districts. It also raises whether the MOU contains adequate enforceability given that the districts are likely to be the primary authority called upon to enforce the MOU.

C. Program Element 2 – Early Introduction of Lower Sulfur Fuel.

Issue: Overall, the lack of substance in this provision leaves it unclear whether the railroads are actually obligated to do anything with regard to early introduction of low sulfur fuel under the MOU.

Discussion:

The MOU requires that "at least 80 percent of the fuel supplied to locomotives fueled in California" must meet the specification for CARB diesel or EPA on-highway diesel by December 31, 2006. However, it is unclear why the standard set at 80 percent when the CARB staff report asserts that by 2007 it is believed that "significantly more than 90 percent" of fuel dispensed by the participating railroads will meet the standard. The MOU should reflect staff findings from the staff report.

In addition, the MOU should address how locomotives supplied with fuel outside of California, but operated within the state, will comply with this standard. The MOU requires that 80% of the fuels pumped into locomotives in California must be low sulfur, but does not require that any specific amount of fuel actually be pumped in California. The only requirement is that use of low sulfur fuel in locomotives be "maximized," a vague term that is rife for dispute by the railroads. Instead, the MOU should either contain criteria that defines the railroads obligation to use low sulfur fuel in California or place the burden on the railroads to document and explain on a periodic basis how they have "maximized" use of such fuel.

D. Program Element 3 – Visible Emission Reduction and Repair Program.

Issue: The MOU fails to provide for any specific opacity standard to measure the railroad's promise to ensure a 99 percent compliance rate. In fact, some language in the staff report suggests that in some cases the railroads will be given credit for complying with the MOU even if their locomotives violate the opacity standard in the California Health and Safety Code.

Discussion:

The MOU requires that the participating railroads ensure that "the incidence of locomotives with excessive visible emissions is very low, so that the compliance rate of [locomotives operated in California] is at least 99 percent." To achieve this, the MOU directs the railroads to develop their own visual emission reduction and repair plan, which must include several components. One of the required components calls upon the railroads to identify "the currently applicable visible emission standard." Thus, the MOU does not actually provide for any specific opacity standard that the railroads must demonstrate 99 percent compliance.

To the contrary, the MOU leaves it to the railroads to determine what opacity standard they consider to be applicable to their locomotives. Notably, there is nothing in the MOU indicating what standard must be used or whether the chosen standard must apply uniformly throughout the state. This failure to set a standard in MOU makes it difficult, if not impossible, to ascertain exactly what it is the railroads actually agreed to do with respect to limiting visible

emissions. The vagueness of the requirement also brings into question whether CARB could even enforce this element of the MOU.

In an apparent attempt to correct this deficiency after the MOU was signed, in the staff report CARB now states that the railroads must ensure 99 percent compliance with the "applicable federal locomotive visible emission certification standard[s]." However, for some locomotives the federal standards are less stringent then California's uniform opacity requirement in Health & Safety Code section 41701. Additionally, the standard in the South Coast is more restrictive then the state standard. Accordingly, use of the federal standard to measure compliance with the MOU would be problematic for two reasons. First, the railroads would be able to tout 99 percent compliance under the MOU even if a much larger portion of their locomotives operated in California do not meet the state and local requirements for excess visible emissions. This is an unwarranted public relations opportunity for the railroads. Second, use of the federal standard directly conflicts with state law, raising the possibility that the entire MOU is void.

In short, the MOU should require that the railroads achieve a 99 percent compliance with the applicable opacity requirement contained in state law, whether under the Health & Safety Code or mandated by a local air district or other local government.

Issue: The MOU lacks sufficient criteria to enable an objective evaluation as to whether the railroads are achieving the promised reductions in excess visible emissions from locomotives.

Discussion:

The MOU does not spell out any specific criteria that the railroad must use to demonstrate compliance with the MOU. Instead, the MOU requires that the railroads independently develop "Statewide Visual Emission Reductions and Repair Programs." While the MOU does set forth nine required components of these programs, the requirements are generalized and vague, leaving ample opportunity for interpretation by the railroads. Indeed, early drafts of these programs provided to CARB demonstrate how much room the railroads believe they were given under the MOU to define the obligation to reduce visible emissions.

First, the MOU lacks specific guidance on the minimum number of inspections the railroads must conduct to ensure compliance. Instead, the MOU requires each railroad to come up with the "annual number of visible emission locomotive inspections in the yards and in the field that [the railroad] commits to conduct in order to develop a base case for determining compliance with the applicable standard(s)." The MOU wholly fails to require that the minimum number of inspections be statistically sufficient to ensure that compliance is actually being achieved. To the contrary, in BNSF's draft program, it has committed only to 100 field inspections statewide each month – a number less then the District would require in the South Coast Basin alone.

Second, the MOU fails to require inspections of locomotives under various operational parameters. Inspections must not only occur in the yard or in a controlled setting, but must be made in the field under real world conditions, including at speed, under load, and at grade power. As it currently reads, the MOU is ambiguous as to how the railroads are to conduct inspections. Nothing at all is mentioned in the MOU on when and where inspections must be performed. In addition, the provisions relating to training of employees appears to limit qualified inspectors to certain personnel who work exclusively in the yards.

In short, the MOU fails to contain enforceable criteria and confuses and/or blends the field and rail yard visible emissions evaluations that are necessary to make the program effective.

E. Program Element 4 – Early Review of Impacts of Air Emissions from Designated Yards.

Issue: This program lacks sufficient clarity, and is wide-open to interpretation by the railroads. For this reason e program element is likely not enforceable.

Discussion:

This program element contains two related requirements. First, the railroads must, within 120 days, determine if "feasible" changes can be made within Designated Yards to lessen the impact on adjacent residential neighborhoods. Second, within 180 days, the railroads must report to CARB on how they plan to implement "feasible" mitigation measures at Designated Yards.

For reasons already discussed, the problem here is that the railroads are obligated to consider "feasible" measures, which under the MOU provides enormous flexibility to the railroads. Arguably, if the railroad concludes that a measure is too costly, i.e., not "feasible," it can refuse to take any early action. Further, under the terms of the MOU the railroad can also refuse to take action on a measure if the railroad concludes that it would interfere with its ability to operate the yard "efficiently," a term that is also not defined in the MOU and, thus, is wide open to interpretation by the railroad.

The MOU is also vague on two other issues. First, it does not provide for whether the railroads must actually take action to address community concerns associated with emissions from rail yards. Second, the MOU does not define the term "adjacent residential neighborhood," leaving the scope of any program to reduce impacts subject to interpretation by the railroad. These should also be addressed.

AQMD believes that the best approach is for the MOU to require prompt completion of HRAs and risk reduction programs similar to those required of other industries under local air district rules and regulations. Short of that, as previously stated the MOU should consider establishing cost effectiveness criteria to guide feasibility determinations.

Issue: The MOU is silent with regards to the railroads obligation to reduce risks at rail yards once HRAs are finalized.

Discussion:

To be frank, the MOU is not ambiguous at all on this issue; it clearly does not require any risk reduction. We would like clarification that CARB really intends to expend millions of dollars to prepare health risk assessments and not require any actual risk reduction at rail yards in the future beyond the pending intermodal yard rule.

F. Program Element 5 – Assessment of Toxic Air Contaminants.

Issue: The MOU leaves it ambiguous as to what data the railroads must provide to CARB to perform health risk assessments at rail yards. In addition, the vague nature of this program element leaves it uncertain as to when HRAs will likely be completed.

Discussion:

The MOU does not specify the data required to be provided by the railroads so the health risk assessments (HRA) can be prepared. Instead, the MOU defers until later more meetings on the "specific nature of the data reasonably necessary for completion of the [HRAs]." This leaves a substantial amount of uncertainty regarding development of HRAs for a large number of rail yards in California. The result is a process open to substantial delay if the railroads attempt to dictate what data should be provided. More importantly, the lack of specificity in the MOU will make it difficult, if not impossible, for ARB to enforce if the railroads disagree with CARB (or the districts) on the type/amount of data needed for an adequate HRA. Indeed, the only thing the railroads committed to do under this program element is to discuss submission of data in the future. The MOU should specify the data required to be provided by the railroads so the health risk assessments (HRA) can be prepared.

G. Program Element 11 – Administration.

Issue: The scope of the release clause is confusing and overly broad.

Discussion:

AQMD continues to believe the scope of the release clause is confusing and should be deleted altogether to address concerns previously raised with CARB staff. For months now, AQMD has asked CARB to provide clarification on two specific sets of questions –

- Does the release clause allow the railroads to back out of the MOU is a city or other local jurisdiction imposes requirements on a new or expanded rail yard to limit health risks, excess emissions, or excess idling?, and;

- What is the meaning of the word "requirement" in the release clause? Does it apply to more then just local air district rules? Does it include project conditions set forth by a city or county or in a lease/license issued by a port or city?

To date, the answer to these questions have been vague, and several statements made at the October CARB Board meeting have only added to the confusion surrounding the intended scope of the release clause.

First, the railroads and CARB staff asserted at the meeting that they believed the scope of the release in the MOU is intended to be no broader than the release in the 1998 MOU. The 1998 clause however was limited to instances in which other jurisdictions imposed restrictions that were "preempted" by federal law. On its face, the language of release clause in the current MOU is obviously much broader. From a legal standpoint the language in the MOU might cover not only the enforcement of newly adopted regulations that may be preempted, but virtually any attempt by a local agency to address emissions from locomotives or rail yards.

Second, the language of the termination clause in the MOU does not comport with statements made by CARB staff and railroad representatives at the October meeting that the termination clause does not cover attempts by local jurisdictions to impose measures to reduce emissions at new rail yards. Nothing in the release cause reflects this position. Moreover, the release clause also does not address local attempts to impose measures where the physical boundaries or the capacity of existing rail facilities are expanded. These are two other legitimate uses of local authority and should be excluded from the scope of the release clause.

Finally, it was suggested at the October meeting that the release cause could not be triggered where mitigation measures were required at a rail yard as part of the CEQA process. But again, this does not currently comport with the existing language in the MOU.

In short, the language of the release clause remains confusing, and on its face is much broader then what now appears to have been intended by either CARB or the railroads. The problem, however, is that if asked to interpret the clause, a court must give effect to the literal language on the agreement, not to the subjective intent of the parties as announced after the forming of the MOU. As a result, unless clarified, the reach of the release clause, and the ability of the railroads to invoke it just about whenever another agency attempts to address emissions from locomotives or rail yards, is apparently without bounds. For the above stated reasons, we continue to request that this "poison pill" provision be removed from the agreement.

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